IN THE

Supreme Court of the United States

October Term, 1976

No. 76-158

ANDREW VALENTINE and VALENTINE ELECTRIC COMPANY, INC.,
Petitioners,

—v.—

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Andrew Valentine and Valentine Electric Company, Inc., jointly pray that a Writ of Certiorari issue to review that portion of an order of the United States Court of Appeals for the Third Circuit entered June 24, 1976, which affirmed the judgment of conviction on Count II of the indictment herein previously entered against each of the Petitioners in the United States District Court for the District of New Jersey on June 3, 1975.

Opinions Below

Following the entry of the judgments in the District Court, Petitioners appealed to the Court of Appeals. The as yet unreported opinion of the Court of Appeals

may be found in the Joint Appendix filed with this Petition (1a-50a).*

Upon the denial by the Court of Appeals to reverse all judgments of conviction, Petitioners and defendant Diaco jointly petitioned the Panel of the Court of Appeals which decided this case for rehearing. The remaining co-defendants jointly petitioned the Court of Appeals for rehearing with suggestion for rehearing *en banc*. By order dated July 7, 1976, all applications were denied (51a).

On July 15, 1976, the Court of Appeals, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, ordered that issuance of the certified judgment in lieu of formal mandate herein be stayed pending the timely filing of this Petition with this Court before August 6, 1976, and if such Petition is so filed, further continued the stay until final disposition by this Court (53a).

The co-defendants Dansker, Haymes and Orenstein have sought and have been granted an extension of time within which to file their respective Petitions with this Court to and including September 3, 1976. The Petitioners and defendant Diaco sought no such extension and have filed their Petitions in compliance with the time limit set by the Court of Appeals.

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* The following abbreviations are used in this Petition:

"a" is a reference to Petitioners' Joint Appendix which is sparately bound and filed with this Petition. The Appendix contains the opinion of the Court of Appeals (Appendix A); the Order of the Court of Appeals denying rehearing (Appendix B); The Order of the Court of Appeals staying the certified judgment in lieu of formal mandate (Appendix C); and the relevant statutory provisions involved (Appendix D).

"R" is a reference to the eleven volume appendix heretofore submitted to the Court of Appeals. These volumes which contain *inter alia* pre-trial and trial testimony, pleadings and exhibits will be certified to this Court;

"T" is a reference to the testimony and rulings of the District Court during trial.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statutory Provisions Involved

1. This case involves 18 U.S.C. 1952—The "Travel Act"; and

2. 28 U.S.C. 144—a statute entitled "Bias or Prejudice of a Judge".

Both of these statutes are fully set forth in Petitioners' Appendix D. (54a-57a).

Questions Presented for Review

Did the Court of Appeals apply an erroneous standard of review when, despite its ruling that the District Judge had erred in submitting to the jury that count of an indictment charging another with a substantive violation of the Travel Act, as well as the conspiracy count, it, nevertheless, affirmed a judgment convicting Petitioners of a substantive violation of that Act even though that judgment of conviction necessarily rested squarely upon the jury's consideration of evidence relating to the erroneously submitted counts?

Did the Court of Appeals apply an erroneous standard of review when, despite its specific finding that the District Judge had, during his tenure as United States

Attorney, made derogatory comments and undertaken repeated widespread criminal investigations into the affairs of a corporate entity as per his publicly proclaimed vows, it nevertheless, held that the District Judge did not err in refusing to disqualify himself upon proper motion in a criminal case in which the corporate entity and its officers were defendants?

Statement of the Case

On December 30, 1974, superseding indictment 74-555 was filed in the United States District Court for the District of New Jersey upon which the Petitioners were tried before Lacey, *J.* and a jury (R. 35-50). That indictment consisted of three counts which charged a conspiracy to violate and substantive violations of 18 U.S.C. 1952—the "Travel Act" (53a).

Count I charged that from January 1, 1974 to June 30, 1974, the Investors Funding Corporation of New York ("IFC"), Norman Dansker, Stephen Haymes, Warner Norton and Donald Orenstein—IFC's President and Vice-Presidents, respectively—, Valentine Electric Company, Inc., Andrew Valentine and Joseph Diaco—Valentine Electric's President and Vice-President, respectively—, and Nathan L. Serota criminally conspired with one Arthur J. Sutton, an unindicted co-conspirator, to travel in interstate commerce and use the facilities thereof with intent to carry on the activity of bribery in violation of the laws of the State of New Jersey in order to bring about the approval by the Board of Adjustment of Fort Lee, New Jersey, of zoning variances which would permit the construction of a large commercial development known as the George Washington Plaza Project ("Project")—a real estate venture

conceived by Sutton and allegedly financed by IFC.* It was further alleged that denial of the necessary zoning variances carried with it dire financial consequences for Sutton, IFC and its officers, all of whom had become very heavily committed to the Project.

It was the Government's theory under Count I that in April, 1974, Andrew Valentine met with Sutton, advised him that the Project was facing serious opposition by Fort Lee's Mayor Burt Ross and the defendant Serota, a resident of Fort Lee, and offered to eliminate the opposition by the payment of bribes in return for Valentine Electric Company becoming the exclusive electrical contractor for the Project. It was said to be a part of the conspiracy that Dansker, Haymes, Orenstein and IFC approved the payment of bribes recommended by Valentine and advised Sutton that IFC would provide the money to pay the bribes. It was further alleged as part of the conspiracy that Serota, an outspoken opponent of the Project, agreed to withdraw his opposition to the Project and to assist in influencing official approval of the Project in exchange for a bribe; and that Diaco tried to bribe Mayor Ross in order to obtain his assistance in securing the approval necessary for the Project.

Count II charged a substantive violation of 18 U.S.C. 1952 and accused the same defendants of using interstate travel and facilities in an unsuccessful attempt to bribe Mayor Ross to use his influence to secure the approval necessary for the development of the Project.

Count III charged another substantive violation of the same statute and accused the same defendants of using interstate travel and facilities to bribe defendant

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* Norton was severed prior to trial.

Serota to withdraw his opposition to the Project and to assist in influencing official approval of the Project.*

A. The Evidence at Trial.

The Government's evidence introduced at trial to establish the charges set forth in the indictment consisted almost entirely of:

(1) the testimony of Mayor Ross which described attempts by the defendant Diaco and by the unindicted co-conspirator, Sutton to bribe him to use his influence in favor of the Project. Mayor Ross's testimony was corroborated by tape recordings of conversations between Ross, Diaco and Sutton. Most significantly, these tapes indicate that with the exception of Diaco and Sutton, neither Petitioner Valentine nor any other defendant knew of the alleged scheme to bribe Mayor Ross; nor did the tapes even mention or remotely incriminate any one other than Diaco and Sutton in that bribery;

(2) testimony that defendant Serota had agreed to withdraw his public opposition to the construction of the Project in exchange for monetary payments. This evi-

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* Serota was described in the indictment as (1) Vice-Chairman of the Fort Lee Parking Authority; (2) an active opponent of the Project before the Board of Adjustment; and (3) the backer of a slate of Fort Lee Council candidates who were seeking election based principally upon their opposition to the Project.

Upon motions for judgment of acquittal before submission to the jury the District Judge entered a judgment of acquittal as to Serota on Counts I and II on the grounds that Serota was not a member of the conspiracy and had no knowledge of the fact that Mayor Ross was to be bribed (T. 3272). The jury found Serota guilty on Count III. That conviction was, however, reversed by the Court of Appeals and Serota's name has been ordered deleted from the caption of this case.

dence was undisputed and corroborated by documents reflecting the agreement;

(3) testimony by Sutton implicating IFC, its officers, Andrew Valentine and Valentine Electric Company, in the bribe of Mayor Ross. This testimony by an unindicted co-conspirator was *wholly uncorroborated* by either tapes or documentary evidence.

After a lengthy trial, the jury convicted the Petitioners on all three counts. Petitioner Valentine was sentenced to a jail term of five years on each count to be served concurrently and to pay a fine of $10,000 on each count. Petitioner Valentine Electric Company was sentenced to pay fines totaling $30,000 (R. 52, 56, 58).

B. The Recusal Motions.

The motion to recuse was initially made by the defendant Diaco under indictment 74-186—the first indictment herein (R. 67, 75-90). This indictment named Sutton and Diaco as defendants and charged them with conspiracy to utilize interstate travel and facilities to commit bribery. By July, 1974 Sutton had become a "cooperating" witness (T. 1701). Thereafter, on September 10, 1974, indictment 74-370 superseded indictment 74-186 and Petitioners were also named as defendants (R. 171). When indictment 74-370 superseded the earlier charge, the motion to recuse was renewed by defendant Diaco. Petitioners Valentine and Valentine Electric also moved to disqualify the District Judge (R. 209-214). On December 30, 1974, indictment 74-370 was itself superseded by indictment 74-555 upon which this case was tried. 74-555 and 74-370 were identical in most respects. The one drastic difference was in the description of the Serota transaction. (R. 39, 175). Nevertheless, petitioners again renewed their motions to disqualify the District Judge (R. 759-765).

Reasons for Granting the Writ

I

Inasmuch as the Court of Appeals ruled that the District Judge had erred in submitting to the jury that count of an indictment charging another with a substantive violation of the Travel Act, as well as the conspiracy count, the Court of Appeals applied an erroneous standard of review when it, nevertheless, affirmed a judgment convicting Petitioners of a substantive violation of that Act even though that judgment of conviction necessarily rested squarely upon the jury's consideration of evidence relating to the erroneously submitted counts.

Although the Court of Appeals directed that a judgment of acquittal be entered as to all defendants on Count III which charged the bribe of Serota and further ordered that Count I be remanded to the District Court for a new trial or dismissal, it nevertheless, affirmed all convictions under Count II. It is the contention of the Petitioners that in affirming the convictions under Count II, the Court of Appeals has applied a new standard of review which contravenes the legal standard ennunciated by this Court and heretofore followed within the Third Circuit and elsewhere. We respectfully submit, this Court should grant review to remove this egregious imbalance within and between the Third Circuit, this Court and elsewhere.

Simply put, in reversing all convictions under Count III the Court of Appeals found that the monetary payments to defendant Serota did not constitute the crime of bribery. This result was inevitable once the Court of Appeals determined that on the basis of the record herein

Serota's public office as Vice-Chairman of the Fort Lee Parking Authority lacked significance because:

> "....the government failed to produce any evidence whatsoever indicating that he had any ability, actual or apparent, to influence official decisions concerning the project in his official capacity, or that the alleged bribers believed he could do so by virtue of his public office. Indeed, on the record before us, it is not even clear that the developers were aware of the fact that Serota was the vice-chairman of the Fort Lee Parking Authority. Hence, on the facts of this case Serota's status as a public official, a factor crucial to the government's theory of criminality, really has no bearing on the issue of whether Serota's activities violated the particular statute involved" (15a-16a.)

Accordingly, the Court of Appeals ruled that while Serota's motives, in exchange for money, to reverse his prior opposition to the Project were "hardly commendable" he did not, nevertheless, commit criminal bribery so as to permit the convictions under Count III to stand (17a).

Having so concluded, the Court of Appeals further held that the convictions under Count I of the indictment must, of necessity, be vacated. As to that Count, the District Judge had instructed the jury that on the basis of the evidence presented it could find *two* unlawful objects of the conspiracy: (1) the attempted bribery of Mayor Ross and (2) the payments to Serota. The jury was further instructed that the Government need only establish a conspiracy to accomplish *either one* of these objectives to sustain its burden of proof under Count I (T. 3882).

Given the instructions by the District Judge, the Court of Appeals was compelled to recognize that it was impossible to determine whether the jury's unspecified

finding of guilt on Count I was based on the theory of the attempted bribery of Mayor Ross, which the Court of Appeals determined was sufficient to justify conviction, or the payments to Serota, which the Court of Appeals found not to be a crime. Since the Court of Appeals concluded that the jury may have found that the defendants engaged in a conspiracy to bribe Serota alone, it could not permit the Count I convictions to stand.

In reaching the determination to vacate the Count I convictions the Court of Appeals specifically overruled the Government's contentions on appeal that inasmuch as the jury found the defendants guilty on Count II, it must have concluded that the Ross bribe was at least *one* of the conspiracy's objectives (19a). The Court of Appeals thus stated:

> "In the instant case, the possibility thus remains, albeit slim, that the jury found the defendants engaged in a conspiracy to bribe Serota alone in spite of its guilty verdict on Count II" (19a).

Despite its *specific awareness of the possibility* that in its deliberations the jury may well have considered the "Serota bribe" the Court of Appeals, nevertheless, refused to rule that the improper submission to the jury of Count III and the evidence relating thereto so infected the convictions under Count II as to require reversal. This conclusion, we submit, is factually and legally unsupportable and should not be permitted to stand.

Unlike defendant Diaco and unindicted co-conspirator Sutton, neither Petitioner Valentine nor any other defendant ever met with Mayor Ross. Thus, while the attempts by Diaco and Sutton to bribe Mayor Ross were recorded on tape, there was absolutely not a scintilla of evidence—documentary or corroborative—to implicate either Valentine or any other defendant in Count II. Indeed, with

regard to Petitioner Valentine and the co-defendants other than Diaco, the Government explicitly relied *entirely* upon a theory of *vicarious* liability and the District Judge so-charged the jury at length.* *Concededly*, the Government's entire case against Valentine and these defendants stood upon the *wholly uncorroborated* testimony of the "co-operating witness" Sutton who, although he had been caught dead on tape bribing Mayor Ross was now, as the *quid pro quo* for his testimony, the recipient of bountiful leniency by the Government (T. 1696-1701).

During the searching cross-examination of Sutton which covered more than 1,100 pages of a 2,600 page transcript, the jury became "fully aware of his (Sutton's) prior conviction, his expectations of leniency and his previous unlawful activities" (39a). Indeed, by the end of his case the prosecutor had felt compelled to admit to the jury that Sutton had come to Court as a Government witness 'seeking to curry favor" (T. 3829-3830). Given the inherently suspect character of Sutton's testimony, the possibility exists—and quite clearly—that the jury may well have rejected Sutton's testimony *entirely* and believed only Ross, the tapes and documentary evidence establishing the "Serota bribe" and his resultant change of position concerning the Project.

If this is so and such a possibility is entirely consistent with the verdict of the jury, especially in light of the successful attack during cross-examination upon Sutton's credibility—the conviction of Petitioners under

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* Specifically, the District Judge instructed the jury that each member of a criminal conspiracy was the agent of every other member; that the acts of any one member of a conspiracy in furtherance thereof are deemed to be the acts of all and all are responsible for such acts; and that responsibility exists even though such acts were done without the knowledge of a fellow conspirator (T. 3874-3878, 3881).

Count II may well have been predicated upon the jury's consideration of the evidence concerning the "Serota bribe" which was, despite the most strenuous pre-trial motions to dismiss, throughout the trial characterized as a "crime" when, in law and in fact, it was nothing more or less than the lawful exercise by an individual of his right to freedom of speech as guaranteed by the First Amendment to the Constitution of the United States.

It is, of course, totally impossible to define with absolute certainty precisely what the jury considered in rendering its general verdict of guilt under Count II. However, in light of the telling assaults during cross-examination upon the veracity of Sutton and the *conceded* lack of direct participation by any defendant other than Diaco in the attempted bribery of Mayor Ross, there exists the *eminently reasonable possibility* that the jury considered the tainted evidence concerning the "Serota bribe" in reaching its finding of guilt.

The Government's theory as manifested in the indictment and throughout the entire trial had, after all, been that the Petitioners and co-defendants criminally offered to eliminate the opposition by *both* Mayor Ross and citizen Serota. It is inevitable that in its deliberations the jury pondered how the Petitioners and co-defendants could have expected to benefit by merely eliminating the opposition to the Project of one but not the other and concluded that no such benefit could be forthcoming unless the opposition of *both* was eliminated. Indeed, the Court of Appeals, even *after* it had ruled that Serota's activities were non-criminal, nevertheless, saw fit to note that "the Serota transaction was an integral part of the defendant's scheme to obtain the variances needed for their project" (20a).

In light of the fact the *Court of Appeals, itself*, saw fit to assess Serota's perfectly lawful transactions as an "integral part of the *defendants' scheme*," how, we submit, may it be properly doubted that a *lay jury*, presented with the Government's theory of bribery of *both* Ross and Serota, and hearing, throughout a lengthy trial, Serota's activities characterized as "crimes" and "conspiratorial acts," would have considered the tainted Serota evidence in its deliberations upon *all counts*. Indeed, the "spill over" effect of 'the tainted Serota evidence must have been devastating upon the jury!

Inasmuch as the *reasonable possibility* cannot be excluded that the jury's verdict on Count II rested upon the evidence of the non-criminal "Serota bribe", all convictions under that count should have been reversed. In failing to reverse, we submit, the Court of Appeals, ignored the theory of the Government's case presented to the jury, misconstrued the thrust of Petitioners' factual argument on appeal, and as will be demonstrated below, applied a patently erroneous legal standard of review.

In affirming the judgments of conviction under Count II, the Court of Appeals stated,

> "Although the district court did err in submitting Count III to the jury, we do not believe that its error so tainted the jury's deliberations on Count II that a reversal of the defendants' convictions for bribing Mayor Ross is in order." (20a).

From the foregoing language it is patently evident that although the Court of Appeals comprehended the distinct possibility that the error of the District Judge in submitting Count III to the jury may have influenced

the jury's deliberations it, nevertheless, affirmed the judgments of conviction under Count II upon the ground that the error did not "so taint" the jury's deliberations. The gross deviation by the Court of Appeals in this case from the timeworn "reasonable possibility" standard of review on appeal has, we submit, not merely done violence to the prior holdings of other Panels within the Third Circuit but has created an irrevocable split between the Third Circuit, other Circuits and this Court.

In *United States* v. *DeCavalcante*, 440 F.2d 1265 (3d Cir., 1971), another Panel of the Court of Appeals for the Third Circuit held that a new trial was required under circumstances virtually identical to those herein. DeCavalcante and others had been convicted of a conspiracy to extort in violation of 18 U.S.C. 1952—the statute herein—and two counts which charged substantive violations of 18 U.S.C. 1952.

On appeal, the Court of Appeals held that the conspiracy had not been proven. Once the Court found that the conspiracy had not been proven, it held that the second count could not stand either since "the actions of the alleged co-conspirators [could] no longer be imputed to DeCavalcante." (*Id.* at 1276). Moreover, even though the third Count was supported by sufficient evidence independent of the conspiracy theory (like Count II, the Ross-attempted bribery count), the Panel in DeCavalcante, unlike the Panel herein, set aside the conviction on that count. In so doing the Court stated:

> "Since the Government did not establish the existence of a conspiracy, the threats by Vastola and the statements by Brennan may not be attributed to DeCavalcante. We do not know whether the jury relied on such facts and statements in its consideration of count three, but the possibilities for confusion in conspiracy trials have often been described. *We believe the possibility that the jury relied on improper evidence in reaching its verdict on count three is sufficiently serious to require a new trial as to this count.*" (Footnote omitted) *Id.*, at 1276.

In *Levy* v. *Parker*, 478 F.2d 772 (3d Cir., 1973), *rev'd on other grounds*, 417 U.S. 733 (1974), the Court of Appeals for the Third Circuit was called upon to determine whether a court-martialed army captain had been prejudiced by joinder of charges under unconstitutional articles 133 and 134 of the Uniform Code of Military Justice with a charge under valid article 90. In concluding that a new trial must be ordered, another Panel of the Court of Appeals stated:

> ". . . it is not the roll of this Court to weigh the evidence to determine whether Levy was or was not guilty of the Article 90 charge. Our sole responsibility is to decide whether there exists a *reasonable possibility* that the court-martial's finding of guilt on the Article 90 charge was influenced by evidence admitted on the Articles 133 and 134 charges. The question of the legality of the Article 90 charge was contested at trial. We cannot be certain whether the court-martial's resolution of that question was affected by evidence of Levy's anti-war sentiments" (emphasis supplied, 478 F.2d 772, 798 (1973)).

Notably, in applying the "reasonable possibility" standard of review, despite the strenuous efforts of the dissenter to distinguish away such standard, the majority in *Levy* cited with approval, *United States ex rel.*,

Hetenyi v. *Wilkins*, 384 F.2d 844 (2d Cir., 1965), which set the standard of review for the Second Circuit.*

In *Hetenyi*, the Court of Appeals for the Second Circuit considered a habeas corpus proceeding concerning a petitioner who had been tried for first degree murder and had been convicted of second degree murder. On appeal, the State court reversed his conviction. In a re-trial he was again charged with first degree murder and again found guilty of second degree murder. In his habeas proceedings petitioner contended that the conviction was obtained in violation of his constitutional right to be free from double jeopardy. In annulling the conviction the Court of Appeals for the Second Circuit, applied the "*reasonable possibility of prejudice*" standard enunciated by this Court in *Fahy* v. *Connecticut*, 375 U.S. 85 (1963), and adhered to by this Court in *Benton* v. *Maryland*, 395 U.S. 784 (1969). It articulated that standard of review as follows:

> "the question is not whether the accused was actually prejudiced, but whether there is *reasonable possibility* that he was prejudiced." (citations omitted, 348 F.2d 844, 865).

Here, too, we respectfully submit, the "reasonable possibility" standard of review should have been employed

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* The dissent in *Levy* was written by Chief Judge Seitz the author of the opinion in the instant case. Notably, in *Levy*, Chief Judge Seitz applied a "substantial prejudice" test—a test *not* concurred in by the majority. In his dissent in *Levy*, Chief Judge Seitz stated: "I am satisfied the joinder of the charges at trial did not *substantially prejudice* Captain Levy's constitutional right to a fair trial on the Article 90 charge" (emphasis supplied, 478 F.2d 772, 811 (1973). By utilizing his "taint" or "*substantial prejudice*" test in the instant case, the reasoning of Chief Judge Seitz in his dissent in *Levy* has now become the law of the Third Circuit despite its violence to the majority holdings in *Levy* and *DeCavalcante* and the holding of the Second Circuit in *Hetenyi*.

and the Court of Appeals should not have endeavoured to speculate upon whether the jury was or was not able to "compartmentalize" the evidence of the "Serota bribe" from the evidence of the Ross attempted bribery (20a). Inasmuch as there is an eminently reasonable possibility that the jury considered the tainted Serota evidence in its deliberations on all counts substantial potential for prejudice inhered in its verdict. The judgments of conviction against Petitioners should not, therefore, have been permitted to stand.

II

Inasmuch as the Court of Appeals made a specific finding that the District Judge had, during his tenure as United States Attorney, made derogatory comments and had undertaken repeated widespread criminal investigations into the affairs of a corporate entity as per his publicly proclaimed vows, the Court of Appeals applied an erroneous standard of review when it, nevertheless, held that the District Judge did not err in refusing to disqualify himself upon proper motion in a criminal case in which the corporate entity and its officers were defendants.

Pursuant to 28 U.S.C. 144, the Petitioners and defendant Diaco duly moved the District Judge to disqualify himself upon the ground, *inter alia*, of his bias and prejudice towards them—a bias and prejudice so pervasive and overwhelming as to deny the Petitioners a fair trial and due process of law. The District Judge held the moving affidavits to be insufficient *on the merits*, refused to disqualify himself and presided over the trial. The Court of Appeals held the District Judge committed no error in presiding at the trial. As will be shown more fully

below, inasmuch as the Court of Appeals applied an *utterly erroneous* standard for review, its ruling contravenes the statutory language of 28 U.S.C. 144, as well as the rulings of this Court, and should not be permitted to stand.

In the instant case, the affidavits filed by the Petitioners and defendant Diaco in support of their respective motions for recusal of the District Court were in full compliance with the requirements set forth in 28 U.S.C. 144 (55a). To the extent that generalization is at all possible, these affidavits established, irrefutably we submit, that the bias of the District Judge towards the Petitioners and defendant Diaco was *actual, explicit, bias in fact, directed towards them personally, of long-standing duration, well-documented and given the greatest exposure by the media at the behest of the District Judge when he served as United States Attorney for the District of New Jersey and thereafter, by his successor United States Attorney.*

As fully set forth in the affidavits of Petitioner Valentine and defendant Diaco, during his tenure as United States Attorney, the District Judge repeatedly and consistently singled out the *Valentine Electric Company* as having sinister and criminal connections with "organized crime" and unalterably pledged himself to make the Valentine Electric Company the subject of criminal investigation—a pledge given the greatest amount of publicity possible (A. 80-86). True to his promise, between 1969 and 1971, Valentine Electric Company became the subject of numerous widespread criminal investigations. Its name was repeatedly sullied in the press by the then United States Attorney; its competitors were publicly invited by the District Judge to bring complaints to the attention of the office of the then United States Attorney; and its

records were repeatedly subpoenaed and presented before Grand Juries inquiring into its business transactions. Ultimately, indictments were handed down against, among others, employees and shareholders of Valentine Electric charging them with, among other things, acts of extortion on and off the premises of Valentine Electric Company.*

In short, the affidavits in support of recusal established *not merely* an attitude of the District Judge evincing the appearance of bias; or a judicial bias directed at the legal issues, the movants' attorneys, or in general; or a bias of short duration possibly developed during the course of the litigation; or merely some nebulous assertion of possible prejudice. (c.f. *Laird* v. *Tatum*, 409 U.S. 824 (1972); *Wolfson* v. *Palmieri*, 396 F.2d 121 (2d Cir., 1968). Rather, the instant affidavits conclusively established *not only reasonable support* for the movants' belief—the quantum of proof required by 28 U.S.C. 144—but they established an irrefutable *factual basis* for the movants' assertion that the District Judge should have disqualified himself.

Despite the irrefutable factual allegations of bias contained in the movants' affidavits and the woeful failure by the District Judge, despite his blockbuster tactics and strained interpretations at oral argument to cast doubt upon counsel filing the requisite certificates of good faith in support of the respective recusal motions, the Court of Appeals, nevertheless, ruled that the District Judge had not committed error in failing to disqualify himself.**

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* See *United States* v. *Addonizio*, 451 F.2d 49 (3rd Cir., 1972), *cert. denied*, 405 U.S. 936 (1972).

** The transcript of the hearing is replete with heated assertions by the District Judge that the recusal motions reflect unfavorably upon his "capacity" and "integrity". (R. 108-136, 164-165; s.a. 1-100). "s.a." refers to "supplemental appendix" (Volume Eleven) submitted to the Court of Appeals.

This ruling by the Court of Appeals we submit, not only embodies a casuistic perversion of the facts, but a totally erroneous misapplication of the law concerning a motion to recuse pursuant to 28 U.S.C. 144.*

28 U.S.C. 144, states as follows:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

The applicable standards for determining the legal sufficiency of an affidavit in support of a recusal motion were definitively set forth by this Court in *Berger* v. *United States*, 255 U.S. 22 (1921). In *Berger*, it was established that although it is the duty of the trial judge against whom a recusal motion is filed to pass upon the legal sufficiency of the affidavit in support of the recusal motion, the truth of the factual allegations set forth in the affidavit in support of the recusal may not be questioned

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*28 U.S.C. 455 also deals with disqualification of a sitting Judge. Even though the recusal motions herein were *not* predicated upon 28 U.S.C. 455, inasmuch as that statute may be relevant to this Court's consideration of the issue presented, we have set it forth in full in Appendix D (55a-58a).

and must be assumed true for the purpose of testing the sufficiency of the affidavit. Thus, in *Berger*, this Court quoted with approval the following language of the Fifth Circuit Court of Appeals in *Henry* v. *Speer*, 201 F. 865 (5th Cir. 1913):

> "Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient then he has no other or further duty to perform than that prescribed in section 20 of the Judicial Code (Comp. St. § 987). He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification" (255 U.S. 22, 36).

"Legal sufficiency" of the affidavit was defined in *Berger* as follows:

> "Of course the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment" (255 U.S. 22, 35).

The affidavits of Petitioner Valentine and defendant Diaco in support of their respective recusal motions and the certificates of good faith filed by their respective counsel, when viewed through the crucible of the *Berger* test, we submit, state with particularity such material facts as would lead any reasonable man to conclude that the District Judge manifested a long-standing, irrevocable and irrefutable personal bias towards the movants. This would have the inevitable effect of precluding him from acting as "a neutral factor in the interplay of adversary forces"—the proper role of a judge in a criminal trial.

American Bar Association Standards Relating To The Function of the Trial Judge, p. 3, June, 1972. *A fortiori*, the District Judge should have "proceed(ed) no further therein" and was duty-bound to disqualify himself as a matter of law. 28 U.S.C. 144; *United States* v. *Thompson*, 483 F.2d 527 (3rd Cir., 1973); *United States* v. *Townsend*, 478 F.2d 1072 (3rd Cir., 1973). See also, dissent of J. MacKinnon in *Mitchell* v. *Sirica*, 502 F.2d 375 (D.C. Cir., 1974); *Disqualification of a Federal District Judge for Bias*, 57 *Minn. L. Rev.* 749 (1973); *Disqualification of Judges for Bias in the Federal Courts*, 79 *Harv. L. Rev.* 1435 (1966).

In affirming the judgment of the District Court, the Court of Appeals stated the rationale for its holding as follows:

> "Neither Valentine nor Diaco make a single allegation indicating that the district judge ever manifested, by word or deed, any hostility, animosity, or, for that matter, any emotion whatsoever towards them personally" (24a).*

From that language it is palpably clear that despite the statutory requirement of 28 U.S.C. 144 that the recusal motion be *perspective* in nature and the holding of *Berger* which long-ago established the standard to be "fair sup-

* Most notably, despite such a sweeping statement, The Court of Appeals, shortly thereafter, felt compelled to concede that "the status of Valentine Electric Company raises a somewhat more difficult problem in light of the fact that the district judge both investigated it and made derogatory comments concerning it while serving as United States Attorney" (24a).

Nevertheless, by the use of what may only be described as the epitome of specious reasoning, the Court of Appeals facilely concluded that *despite* the vituperative and jaundiced statements of the District Judge towards Petitioner Valentine's close corporation and namesake, there was no error.

port to the charge of a bent of mind that may prevent or impede impartiality of judgment" upon factual allegations which *may not* be questioned and *must* be assumed true, the Court of Appeals has, by its holding herein, established the standard for recusal in the Third Circuit to be a *retrospective* determination as to whether or not the trial judge evinced *actual venal antipathy* to the movant at some time during the proceedings upon facts which *may* be contested. Inasmuch as this standard subverts the holding of *Berger* and 28 U.S.C. 144, we respectfully submit, this Court should grant review.

While we are not unmindful that a federal judge has a duty to sit where not disqualified (*Laird* v. *Tatum*, *supra*, p. 837), in the instant case, measured by the *Berger* standard, it was incumbent upon the District Judge to conclude that given his publicly stated intentions and his predominant role in the widespread and continuous criminal investigations of Valentine Electric and its principals while he served as United States Attorney, his impartiality as a judge in a criminal trial involving, among others, Andrew Valentine and Valentine Electric would be reasonably, if not assuredly, questioned—and properly so! Contrary to the opinion of the Court of Appeals, this was *not* merely a case of "an impersonal prejudice [going] to the judge's background and associations." (c.f.) *Parker Precision Products Co.* v. *Metropolitan Life Ins. Co.*, 407 F.2d 1070 (3d Cir. 1969). Indeed, on this record the District Judge was an "accuser" who "also sat in judgment". *Mitchell* v. *Siricia*, *supra*, p. 385.

Moreover, the District Judge's misplaced belief that despite the compelling nature of the facts presented in the recusal affidavits, he could, nevertheless ,be impartial, is of no consequence in light of 28 U.S.C. 144, and in light of everyday teaching and experience.

In *In Re Murchison* this Court stated:

> "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between the contending parties. But to perform its high function in the best way "Justice must satisfy the *appearance of justice*" emphasis supplied, 349 U.S. 133, 136 (1955).

See also, *Offutt* v. *United States*, 348 U.S. 11 (1954); *Commonwealth Coatings Corp* v. *Continental Casualty Co.*, 393 U.S. 145 (1968).

Perhaps the concept was best expressed in the words of Judge Cardozo when he long-ago stated:

> "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the result is an outlook on life, a conception of social needs, a sense in James' phrase of "the total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choices will fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought—a form of pleading or an act of parliament, the wrongs of paupers or rights of princes, a village ordinance or a nation's charter."

Cardozo, *The Nature of the Judicial Process*, Yale University Press, pps. 12-13, 1922.

CONCLUSION

For all of the above reasons the petition for a writ of certiorari should be granted; the judgments of conviction should be reversed; and a new trial should be ordered.

Respectfully submitted,

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